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18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**
21 **IN RE GOOGLE PLAY STORE**
22 **ANTITRUST LITIGATION**
23 THIS DOCUMENT RELATES TO:
24 *States et al. v. Google LLC et al.*, Case No.
3:21-cv-05227-JD
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28 DEFENDANTS' OPPOSITION TO THE STATES' MOTION FOR APPROVAL OF NOTICE OF PENDENCY AND OPPORTUNITY TO OPT-OUT FOR *PARENTS PATRIAET* CLAIMS
Case No. 3:21-md-02981-JD
DEFENDANTS' OPPOSITION TO THE STATES' MOTION FOR APPROVAL OF NOTICE OF PENDENCY AND OPPORTUNITY TO OPT-OUT FOR *PARENTS PATRIAET* CLAIMS
Case Nos. 3:21-md-02981-JD; 3:21-cv-05227-JD

INTRODUCTION

2 Google objects to the Plaintiff States’ (“States”) proposed forms of the Summary Notice
3 and Long-Form Notice for the States’ *parens patriae* claims (“Proposed Notice”) to the extent
4 that they omit the fact that any recovery by the States may be reduced to pay attorneys’ fees to
5 counsel for the States and potentially counsel for the consumer plaintiff class (“Consumer Class
6 Counsel”) who do not represent consumers in the plaintiff States. The States should inform the
7 consumers that they purport to represent that the States have agreed to let lawyers who do not
8 represent those consumers apply for fees that will reduce the amount of money available to
9 consumers. Google respectfully requests that the Court order a modification to the Proposed
10 Notice to ensure that consumers are aware of these facts. Google does not take a position on the
11 other issues raised in the States’ motion.

ARGUMENT

13 Google objects to the States' Proposed Notice as it fails to sufficiently and adequately
14 inform consumers that any recovery by the States could be reduced to pay attorneys' fees not only
15 for the States' own counsel but also for Consumer Class Counsel who do not represent consumers
16 in the plaintiff States.

17 The Proposed Notices do not say anything about the prospect that any recovery by the
18 States on behalf of consumers could be reduced to pay attorneys fees or expenses of counsel.
19 Courts regularly direct parties to include that information to assist consumers in making an
20 informed decision when deciding whether to opt-out. *See Ayala v. Coach, Inc.*, 2016 U.S. Dist.
21 LEXIS 144303, *8 (N.D. Cal. Oct. 17, 2016) (Donato, J.) (finding that notice was sufficient
22 where it “fairly, plainly, accurately, and reasonably provide[d] class members” “appropriate
23 information” about, *inter alia*, “the plaintiff’s and class counsel’s forthcoming applications for
24 service payments, attorneys’ fees, and expenses[.]”); *Ruch v. AM Retail Grp., Inc.*, No. 14-CV-
25 05352-MEJ, 2016 WL 1161453, at *5 (N.D. Cal. Mar. 24, 2016) (directing the parties to include
26 certain information in the notice, including information on the calculation of attorneys’ fees);
27 *Campbell v. Best Buy Stores, L.P.*, 2014 U.S. Dist. LEXIS 195093, *15 (C.D. Cal. Apr. 18, 2014)

1 (approving class notice stating that counsel “will be paid only if” plaintiffs win at trial or the
 2 parties settle, in which case the “fees will either be paid by” the defendant “or as a percentage of
 3 any monetary judgment in favor of” plaintiffs and that “[i]f there is no recovery, there will be no
 4 attorneys’ fees paid to the lawyers.”).¹

5 In fact, the notices cited by the States in their motion include this information. For
 6 example, the States cite *California v. eBay, Inc.* for the proposition that “federal courts in this
 7 District have adopted the procedures and standards used in class actions under Federal Rule of
 8 Civil Procedure 23” when determining whether “proposed *parens patriae* notices or settlements
 9 should be approved.” MDL Dkt. No. 546 (“Mot.”) at 4. In *eBay*, the court-approved notice
 10 includes a section titled “How will the lawyers be paid?” and informs consumers that the States’
 11 “attorneys’ fees and costs” will be recovered from the money and benefits obtained in the case.
 12 See Declaration of Kuruvilla Olasa (“Olasa Decl.”) Ex. 1, ¶ 16, *California v. eBay, Inc.*, No. 5:12-
 13 cv-05874-EJD, Dkt. Nos. 55-6, 85 (N.D. Cal. Sep. 3, 2015); see also Olasa Decl., Ex. 2, *In re*
 14 *TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827-SI, Dkt. Nos. 7158-2, 7697 (N.D. Cal.
 15 Apr. 3, 2013) (court approved notice explaining that attorneys fees (among other costs) will be
 16 deducted from funds being distributed to the class); Olasa Decl., Ex. 3, ¶ 18, *In re Macbook*
 17 *Keyboard Litig.*, No. 5:18-cv-02813-EJD, Dkt. Nos. 420-3, 426 (N.D. Cal. Dec. 2, 2022) (same);
 18 Olasa Decl., Ex. 4, ¶ 15, *In re Facebook Internet Tracking Litig.*, No. 5:12-md-02314-EJD, Dkt.
 19 Nos. 233-1, 241 (N.D. Cal. March 31, 2022) (same); Olasa Decl., Ex. 5, ¶ 11, *Cottle v. Plaid*,
 20 *Inc.*, No. 20-cv-3056-DMR, Dkt. Nos. 138-1, 153 (N.D. Cal. Nov. 19, 2021) (same); Olasa Decl.,
 21 Ex. 6, ¶ 9, *Taylor v. Shutterfly, Inc.*, No. 5:18-cv-00266, Dkt. Nos. 101-1, 106 (N.D. Cal. Dec. 7,
 22 2021); Olasa Decl., Ex. 7, ¶ 17, *Briseno v. ConAgra Foods, Inc.*, 11-cv-05379-CJC-AGR, Dkt.
 23 Nos. 652-1, 655 (C.D. Cal. Apr. 4, 2019) (same); Olasa Decl., Ex. 8, ¶ 16, *In Re USC Student*

24 ¹ Indeed, the Judges’ Class Action Notice and Claims Process Checklist and Plain Language
 25 Guide published by the Federal Judicial Center cautions courts to consider whether “notices
 26 contain sufficient information for a class member to make an informed decision” and to “watch
 27 for the omission of information that the lawyers may wish to obscure (such as the fee request) but
 28 that affects class members nonetheless.” See Judges’ Class Action Notice and Claims Process
 Checklist and Plain Language Guide available at
<https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf>.

1 *Health Center Litig.*, No. 2:18-cv-04258-SVW-GJS, Dkt. Nos. 139-2, 148 (C.D. Cal. June 12,
 2 2019) (stating that attorneys fees will be separately paid by defendants and not deducted from any
 3 funds obtained by the class).

4 Providing consumers with information about applications for attorneys' fees is
 5 particularly appropriate here, where the States have an agreement with Consumer Class Counsel
 6 regarding fee applications. In their Joint Prosecution Agreement ("JPA") with the consumer class
 7 (MDL Dkt. No. 250-3), the States have agreed that Consumer Class Counsel may request fees to
 8 be paid out of any recovery obtained for consumers even though the Class Counsel do not
 9 represent consumers in those States. *See* JPA § IV (MDL Dkt. No. 250-3) (noting that under the
 10 agreement "Class Counsel may make an application to the Court for an award of attorneys' fees
 11 and reimbursement of litigation expenses from any recovery created by resolution of the Covered
 12 Claims [the *parens patriae* claims brought by State Plaintiffs], whether by settlement, verdict or
 13 judgment"). In other words, public officials who purport to represent consumers in their States
 14 have agreed that lawyers who do not represent those consumers can apply for fees to be paid out
 15 of a fund that would otherwise go to the consumers. The Proposed Notices should inform
 16 consumers of that fact.

17 The States' motion argues that Google has not identified precedent for providing this
 18 information in a *parens patriae* notice. That is because the States have not identified any
 19 precedent for the JPA arrangement entitling Consumer Class Counsel to apply for fees out of
 20 funds recovered for consumers who those lawyers do not represent.

21 **CONCLUSION**

22 The Proposed Notice for the States' *parens patriae* claims should be modified to include
 23 information about attorneys fees, including that any recovery by the States may be reduced to pay
 24 attorneys' fees to counsel for the States and potentially Consumer Class Counsel who do not
 25 represent consumers in the plaintiff States.

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1 Dated: August 10, 2023

2 Respectfully submitted,
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